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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 426.

LESTER ETTMAN, *Petitioner,*

v.

FEDERAL LIFE INSURANCE COMPANY, *Respondent.*

PETITION (1) FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI OR (2) IN THE ALTERNATIVE FOR AN ORDER OF REMAND.

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INDEX.

	Page
Foreword	1
New Questions Presented	2
Statement	3
New Specification of Errors	3
Discussion	4
1. Are state statutes law "per se" or "sources of law"?	4
2. Is there a duty to construe?	5
3. Is there a duty to inquire?	8
4. Is there a duty to remand?	9
Errors Urged in Original Petition	10
1. Applicability of Misrepresentation Statute	10
2. The rule of waiver one of substantial law	12
Conclusion	13

CITATIONS.

CASES:

Brummer v. Ins. Co., 59 S. W. (2) 781 (Mo. App.)	6
Elliff v. Ass'n Co., 153 Kans. 177	11
Erie R. Co. v. Tompkins, 311 U. S. 223	4
Fraker v. Casualty Co., 278 S. W. 1053 (Mo. App.)	10, 11
Garrett v. Moore McCormack Co., 316 U. S. 656	12
Heydon's Case, 3 Co. 7	6
Lilly v. Ins. Co., 44 S. W. (2) 656	10
Loduca v. Ins. Co., 105 S. W. (2) 1011	12
Meredith v. Winter Haven, (Sup. Ct.) No. 42, 1943 Term	1, 2, 4, 5, 13
Nevil v. Wahl, 65 S. W. (2) 123 (Mo. App.)	12
Pretz v. Insurance Co., 71 S. W. (2) 826	12
Securities & Exch. Comm. v. Joyner Leasing Corporation, (Sup. Ct.) No. 24, 1943 Term	5, 6, 7

Page

State ex rel. v. Allen, 303 Mo. 605 12
United States v. Dotterweich, (Sup. Ct.) No. 5, 1943 Term 5, 6, 7
West v. Telephone Co., 311 U. S. 223 9

STATUTES:

Laws of Missouri (1874), p. 89 6
Laws of Missouri (1879), Sec. 1 6
Rev. Stat. Missouri (1889), Sec. 5811 7
Laws of Missouri (1919), p. 391 7

MISCELLANEOUS:

Gray, The Nature and Sources of Law 5
Landis, Statutes and the Sources of Law..... 5
Stone, The Common Law in the United States..... 5
Stone, Law and Its Administration 5

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FOREWORD.

Counsel believe that the court's decision in *Meredith* v. *Winter Haven*,[1] decided the same day that certiorari was denied herein, places the present case in an entirely different light from that presented in the original petition for certiorari.

In brief, we believe the decision below is based on a conception of the scope of a federal court's duty in the construction of state statutes basically at variance with the principle, if not the direct holding, of the *Meredith* case. The conflict in philosophy is so basic, and raises problems in judicial administration of such general importance, that we feel warranted in praying that the court either (a) remand the case to the Court of Appeals for reconsideration in the light of the principle underlying the *Meredith* case, or

[1] No. 42, 1943 Term; 88 L. ed. (Adv.) 1.

(b) consider this motion as though it were an original petition for certiorari, affording counsel for respondent, if that is deemed proper, the same opportunity of filing a reply brief as in the case of an original petition.

NEW QUESTIONS PRESENTED.

1. Whether a federal court, under *Meredith* v. *Winter Haven,* can refuse to apply a state statute beyond its literal wording, solely on the ground that the statute *has not yet been* "expanded" by "compelling authority" of prior state court decisions.

2. Whether it is not the duty of a federal court, in such case, to affirmatively decide whether the literal wording of the statute *ought* to be "expanded", giving due consideration to:

(a) The legislative history of the statute, its dominating general purpose, and the trend of prior state court decisions;

(b) The reasonableness, in terms of all these considerations, of either "expanding" or not "expanding" the statute; and

(c) In general, whatever other factors would be appropriate were the decision being made by a state court itself.

3. If there is such affirmative duty, whether a Circuit Court of Appeals should reverse an interpretation of a state statute assumed by the District Court and not questioned in the briefs or argument before it, without first asking for reargument on this issue.

4. Whether, as a matter of judicial administration, a Circuit Court of Appeals, in such situation, should not remand the case to the District Court, more familiar with the state decisions and their prevailing interpretation by the state courts and bar, rather than consider the statute on the basis solely of its own reading of some of the reported decisions.

STATEMENT.

The statute in question is the Missouri Misrepresentation Statute which bars certain defenses with respect to policies of "insurance on the life or lives of any person or persons." The policy in suit was a health and accident policy under which insured had not applied for indemnity for death. The District Court (the Judge before whom the case was tried had previously been a Justice of the Missouri Supreme Court) and both parties assumed that this statute did apply to petitioner's policy.

The opinion of the Court of Appeals, holding that the federal courts could not apply the statute to the policy, did not consider the legislative history of the statute, or its dominating general purpose, or any other of the elements appropriate in the interpretation of statutes. It pointed to no decisions holding or indicating that the Missouri courts would *not* apply the statute to a policy such as the plaintiff's. To the contrary, it conceded that, in the light of prior decisions of the Missouri courts, it was "possible that the courts of Missouri may, by construction, *expand* this statute to cover every kind of policy written by a company authorized to write insurance on life." It concluded, however, that since the Missouri courts "as yet * * * have not" *expanded* the statute, the court "in the absence of compelling authority * * * will not rule, intimate or agree that the statute applies to the policy in suit."

NEW SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred (in addition to the errors pointed out in the original petition for certiorari):

1. In rejecting the view of the District Court and of both parties that the Misrepresentation Statute did apply to petitioner's policy, solely on the ground (dubious under the cases cited *infra* pp. 9-11) that the Missouri courts *had not yet* "expanded" the statute "by construction" to expressly cover the case at bar.

2. In not itself considering and deciding the applicability of the statute in the light of:

(a) The legislative history of the statute, its "dominating general purpose," and the trend of prior state court decisions;

(b) The reasonableness, in terms of all these considerations, of either "*expanding*" or not "*expanding*" the statute; and

(c) In general, whatever other factors would be appropriate were the decision being made by a state court itself.

3. In not remanding the case to the District Court to decide the applicability of the statute not merely on the basis of the few reported cases but also in the light of the interpretation, if any, commonly accepted by the Missouri bench and bar, or, if this was not error, then,

4. In not affording counsel the opportunity, on reargument, to thoroughly brief and argue the applicability of the statute which had not previously been questioned in the case. (As pointed out pp. 10-12 herein, the Circuit Court's necessarily limited research overlooked two Missouri cases which counsel have since found which squarely support the District Court's view.)

DISCUSSION.

1. *Are state statutes to be treated by the federal courts as law "per se" or "sources of law"?*

The decision below involved a fallacy in legal thinking which, unless corrected at the start, can play havoc with the objectives of *Erie R. Co.* v. *Tompkins*,[2] and *Meredith* v. *Winter Haven.*

The theory of the court below was apparently this: That statutes are not starting points for judicial law making, but an intrusion on the common law effective, per se, only

[2] 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817.

within the confines of their precise wording; that when state courts apply a statute beyond its precise wording they are "expanding" what was previously inapplicable; that, hence, the "law" of a state to be applied by the federal courts cannot include a situation beyond the literal wording of the statute until the statute has already been "expanded" by the state courts.

This theory of the trial court, we submit, involves a fallacy that derives from the same attitude, "hostile to the legislative process itself", repudiated in the *Joyner Leasing Corporation*[3] and *Dotterweich*[4] decisions of November 22nd. These cases, of course, involved the construction of a federal statute and not the interpretation by federal courts of ambiguous state enactments. We submit, however, that the fundamental concept underlying these cases, *with respect to the nature of the judicial process, in connection with the interpretation of statutes,* is inconsistent with the limited conception of the court below as to the scope of its power to interpret state enactments.

2. *Is there a duty to construe?*

The correct view, we submit, is that state enactments are never *law per se* but in reality, merely only one of the *sources of law* that make up the total jurisprudence of a state;[5] that, when state courts apply a statute beyond its literal wording, they are not "expanding" a rule that did not previously apply but are merely clarifying what was previously in doubt; that, therefore, under the *Erie* case, and particularly since the *Meredith* case, a federal court

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[3] No. 24, 1943 Term.

[4] No. 5, 1943 Term.

[5] This point needs no elaboration beyond reference to *Gray*, The Nature and Sources of Law, 2nd Ed., 1924, p. 170 et seq.; Landis, *Statutes and the Sources of Law*, Harvard Legal Essays (1934) 213, et seq.; Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 12-16 (1936); Stone, *Law and Its Administration* (1924) p. 25.

cannot refuse to apply a statute merely because it has not previously been "expanded", but *must assume a positive role in interpreting the statute just as though it were a state court faced with the same problem.*

If there is such a duty, more is necessary, under the *Meredith* case, than was done here by the Court below. At the very minimum, there is a duty to consider the legislative history of the statute and its *"dominating general purpose"* [6] and to recognize that a legislative enactment *"is to be treated as a working instrument of Government and not merely a collection of English words."* [7]

In this case, the legislative history of the Missouri Misrepresentation Statute (which the Court below deemed itself without authority to consider) leaves little doubt that the statute ought to be construed to cover all policies of insurance other than insurance on property. While this is not the occasion (or, we believe, the forum) to weigh this legislative history, the following summary may be appropriate as emphasizing what we believe is the proper scope of the duty to construe.

The Missouri Misrepresentation Statute was enacted in 1874.[8] At that time, the only type of insurance on persons recognized by the Missouri statutes was "assurance upon the lives of individuals".[9] It is therefore only natural that the Misrepresentation Statute was worded solely in terms of misrepresentations in obtaining "a policy of insurance on the life or lives of any person or persons". The authority of life insurance companies to issue other forms of coverage with respect to persons was not extended to

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[6] *Securities & Exch. Comm.* v. *Joyner Leasing Corp.*, 4 U. S. S. Ct. Bulletin (1943-1944) 109, at 113.

[7] *United States* v. *Dotterweich*, 4 U. S. S. Ct. Bulletin (1943-1944) 117, at 119.

[8] Laws of Missouri (1874), p. 89.

[9] Laws of Missouri (1879), "An Act for the incorporation and regulation of Life Insurance Companies", Sec. 1, reading "Any number of persons * * * may associate and form a company for the purpose of making assurance upon the lives of individuals."

include accident disability until 1889,[10] or to cover sickness disability, until 1919.[11]

From this history alone, we submit that a court could reasonably conclude (a) that the Missouri legislature of 1874, in using the words "insurance in the life or lives of any person or persons", could not conceivably have intended them as words of art in contradistinction to policies providing indemnity for accident or sickness; (b) that the evil at which the statute was directed is as serious when an accident or sickness policy is forfeited for innocent breach of warranty as when the forfeiture is made of a straight life policy; and (c) that, therefore, in the absence of subsequent legislation expressly *excluding* these new types of insurance, the statute must be construed as being applicable to them.

We do not here suggest that this is the only conceivable inference which might be drawn from the legislative history. Neither do we suggest that the federal courts can read into the jurisprudence of a state a policy of liberal statutory interpretation where the state courts themselves have adopted one "hostile to the legislative process itself". Conversely, however, where, as is true here, the state courts have been consistently liberal, and *concededly might* apply the statute to a situation not within its literal terms, it is the duty of the federal court to consider the legislative history and dominating general purpose of the legislation, if not as sympathetically as the *Joyner* and *Dotterweich* cases require with respect to federal legislation, then at least as sympathetically as did the court in *Heydon's Case*[12] almost five centuries ago.

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[10] Missouri Rev. Statutes (1889), Sec. 5811.

[11] Laws of Missouri (1919), pp. 391, 392.

[12] 3 Co. 7 (1584): "For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law) four things are to be discerned and considered: 1st. What was the Common Law before the making of the Act. 2nd. What was the mischief and defect for which the Common Law did not provide. 3rd. What remedy the Parliament

3. *Is there a duty to inquire?*

We submit that a federal court, particularly a court of appeals, should not, within the doctrine of the *Meredith* case, assume the weighty responsibility of overruling a District Court on a dubious question of statutory construction, not discussed in the briefs on appeal, without at least opening the case for reargument (assuming that it ought not go further and remand the case to the District Court).

In this particular case the applicability of the Misrepresentation Statute *had never been questioned until the Court of Appeals handed down its final opinion.* Counsel had no opportunity to brief or argue the issues before the court. Counsel's only opportunity was on motion for rehearing; and the issues previously in the case were by themselves so complicated that counsel cannot be regarded, we submit, as having had, merely in the time allowed for his motion for rehearing, a proper opportunity to brief and present the admittedly complicated problem of statutory construction which was involved.

That this is no fanciful argument is borne out by what actually has occurred in this very case. *Counsel have in the past few days found two Missouri decisions*[13] *which the Circuit Court of Appeals did not cite in its opinion, and apparently overlooked, which squarely support the interpretation of the statute followed by the District Court.*

Normally the failure of counsel to discover all applicable decisions is a risk that any litigant is bound to assume; and we are not attempting to excuse the omission of these

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resolved and appointed to cure the disease of the Commonwealth. And 4th. The true reason of the remedy; and then the office of the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico." (As quoted by *Gray, The Nature and Sources of the Law* (2nd Ed. 1924) p. 178)

[13] See infra p. 10.

cases in our original petitions. Our whole point, rather, is to emphasize the essential impropriety of a Circuit Court of Appeals injecting a new and difficult question of state statutory construction into a case without at least affording counsel an opportunity to fully brief and argue the point.

4. *Is there a duty to remand?*

Enough has been said, we believe, to demonstrate the error of the Court of Appeals in reversing the District Court without assuming the affirmative duty to construe, considering the legislative history of the statute, its dominating general purpose, and other factors appropriate were a state court faced with the same case.

We submit, however, that the proper procedure, in a case like this, is for the Circuit Court of Appeals to remand the case so that the District Court, rather than the Court of Appeals, can discharge the responsibility of construing the local statute.

As this Court said in *West* v. *Telephone Company*[14] "there are many rules of decision commonly accepted and acted upon by the bar and inferior courts, which are nevertheless laws of the states, although the highest court of the state has never passed upon them". If this be true, it would seem that the *initial* interpretation of an ambiguous state statute should be made by the District Court which, in fact as well as in theory, is usually in closer rapport with the rules of decision commonly accepted and acted upon within the state, than the Circuit Courts of Appeal can possibly be.

On this point, we hope it is not entirely irrelevant to point out that the District Judge, with whose interpretation of the statute the Circuit Court of Appeals disagreed, was, before his appointment to the federal bench, a member of the Supreme Court of Missouri; or to point out that, with

[14] 311 U. S. 223, 236; 85 L. ed. 139; 61 S. Ct. 179.

very few exceptions, our district judges are appointed from among the local bench and bar of the state in which they preside.

Errors Urged in Original Petition.

In emphasizing the additional errors discussed above, counsel should not be deemed as minimizing the importance of the errors discussed in the original petition for certiorari. As to these, the following comments are submitted, in addition to those included in petitioner's original petition.

1. *Applicability of Misrepresentation Statute.*

If we are in error in arguing that there was an affirmative duty to construe beyond the decided cases, then the decision below constituted plain error under the *Erie* case in view of the two reported Missouri decisions which petitioner has found since the denial of his original petition for certiorari, already referred to above (p. 8).

These cases are *Lilly* v. *Washington Fidelity National Insurance Co.*[15] and *Fraker* v. *Commonwealth Casualty Co.*[16]

These two decisions, we submit, indicate clearly that the Missouri courts have in fact applied the Misrepresentation Statute to accident and health policies, *even where those policies do not provide death benefits,* and hold that the issue of misrepresentation in the case of such policies, as well as in the case of life policies, is one for the jury, and the harsh doctrine of warranty invoked by the Court of Appeals is not applicable.

In the *Lilly* case, *supra,* the Kansas City Court of Appeals, in a suit on an "accident and health policy" *which did not include death benefit provisions,* held that the Misrepresentation Statute in question was applicable and held that the trial court properly refused to give an instruction that if plaintiff wrongfully and intentionally withheld and

[15] 44 S. W. (2d) 656 (Mo. App., 1931).
[16] 278 S. W. 1053 (Mo. App., 1926).

concealed from defendant facts material to the assumption of risk and the acceptance of hazard in his answers to the questions asked in the application, it should find for the defendant, even though such misrepresentations did not directly contribute to the illness and consequent loss of time. The court held (I. c. 658) that, "This instruction is in the very teeth of the Misrepresentation Statute," quoting the statute. Furthermore, the Court held that the instruction was properly refused because there was no deposit in Court of the premiums, as required by the second section of that statute, now Section 5846 R. S. Mo. 1939, which also refers to "life policies", clearly showing, we submit, that the Missouri Courts do in fact construe the statute to include accident and health policies without death benefits.

The *Fraker* case, *supra,* was also a suit on an accident and health policy without death benefits. The plaintiff admitted that he had a venereal disease at the time of the application for insurance, but invoked the provision of the Misrepresentation Statute. The Kansas City Court of Appeals again held that the defense of misrepresentation was not available, because of the Misrepresentation Statute.

We have already shown in our original petition for certiorari that Kansas, which has the same Misrepresentation Statute, also held it applies to accident and health policies. (Elliff v. Assn. Co. 153 Kans. 177, 109 Pac. (2d) 92, l. c. 95.) So far as we know, Missouri and Kansas are the only two states in the United States which have a practically identical Misrepresentation Statute, the sole difference being that the Missouri statute not only limits the type of defenses which can be raised but also requires a jury trial on those which are still permitted.

In the light of the two cases cited above, as well as the trend of legal thinking evidenced by the cases in our original briefs (and even without looking at the statute's legislative history or general purpose), we believe that the Court of Appeals was clearly in error in holding that the statute

did not apply to plaintiff's policy, merely because of the fortuitous circumstance that his application for insurance did not request any payments in the event of death through accident.

2. *The rule of waiver and the right to a jury trial thereon is one of substantive law.* Pretz vs. Ins. Co., 71 S. W. (2d) 826, l. c. 831; Nevil vs. Wahl, 65 S. W. (2d) 123, 228 Mo. App. 49.

On December 14, 1942, this Court held (Garrett vs. Moore-McCormack Co.[17]) that whether a state court in trying a case in which rights asserted are granted by federal law, proceeded in such a manner that all the substantial rights of the parties under controlling federal law were protected, raised a federal question. This Court held that the right of the petitioner, in the Garrett case, to be free from the burden of proof imposed by the Pennsylvania law inhered in the cause of action. By parity of reasoning, and under the principle announced in the Garrett case, the issue of waiver and the right to have that issue tried by jury is a part of the very substance of petitioner's claim. As said in the Garrett case, "It cannot be considered a mere incident of a form of procedure."

Under the Missouri law, where the insurer examines the applicant (R. p. 211) and receives information, which if pursued with reasonable diligence, would lead to a discovery of the situation, it waives the physical condition of the applicant and is estopped to deny his insurability. Brummer vs. Ins. Co., 59 S. W. (2d) 781, l. c. 786; Loduca v. Ins. Co., 105 S. W. (2d) 1011; State ex rel. vs. Allen, 303 Mo. 608, 262 S. W. 43.

We believe that under the Missouri law the insurance company waived any additional examination as a matter of law, but that in any event this was an issue for the jury. The trial court refused to submit the issue to the jury (R. 265-266) and the Court of Appeals affirmed and refused to consider the same.

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[17] 316 U. S. 656, 62 S. Ct. 1268.

CONCLUSION.

The issues in this case are, we believe, basic to the proper application of the *Meredith* decision in the important area of statutory construction in diversity of citizenship cases. They are issues, we believe, which must be resolved sooner or later by this court. We trust, therefore, that it is not inappropriate to suggest that, by resolving them here, the Court may also ameliorate what was admittedly[18] a harsh decision below.

Respectfully submitted,

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We certify that this petition is presented in good faith and not for delay.

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[18] The District Court, in its memorandum opinion (R. 284, 286) said: "The contract under consideration belongs to a species which fortunately is rapidly becoming extinct. The more modern practice of greater fairness to the insured and fewer limitations on the liability of the insuror is not exemplified by the provisions of the policy in suit."

END OF

A CASE